STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 18 CVS 014001

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, *et al.*,

Defendants.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY AMERICAN OVERSIGHT

American Oversight, a non-profit government watchdog group, respectfully moves this Court for leave to file the attached *amicus curiae* brief in support of the plaintiffs. In support of this Motion, American Oversight shows the Court as follows:

1. American Oversight seeks permission to participate as *amicus curiae* to share its singular perspective, derived from experience using federal and state open records laws to seek disclosure of government records, on the issues before this Court.

2. American Oversight uses state and federal open records laws to acquire and share information with the public about what their government is doing on their behalf, based on the belief that a democracy requires an informed electorate.

3. If permitted to participate as *amicus curiae*, American Oversight will explain why the so-called "Hofeller Files" should not be considered confidential under the open records laws of North Carolina, as well as various other states, and should, in fact, be disclosable.

WHEREFORE, American Oversight respectfully requests that this Court:

a. Grant American Oversight leave to submit the attached *amicus curiae* brief in support of the plaintiffs; and

b. Grant such other and further relief as the Court deems just and proper.

This 13th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Motion for Leave to File *Amicus Curiae* Brief by American Oversight with the attached Brief by email and by first class mail, postage prepaid and addressed to the following:

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This the 13th day of September, 2019.

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Defendants.

BRIEF OF AMERICAN OVERSIGHT AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF COMMON CAUSE AND IN SUPPORT OF DISCLOSURE OF "HOFELLER FILES"

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

American Oversight is a nonprofit watchdog group that relies upon public records—and their availability pursuant to open records requests and litigation—to investigate government misconduct and hold public officials accountable. The organization specifically engages in state-level open records work to investigate issues related to vote suppression and redistricting. Accordingly, American Oversight has a strong interest in, and writes to urge the Court, to maintain the transparency of the so-called "Hofeller Files." Based on the public record and reporting to date, the Hofeller Files provide unparalleled opportunities for citizens to learn upon what their elected representatives have relied in creating and drawing legislative districts, impacting a fundamental constitutionally protected right: the right to vote. The public availability and dissemination of such records enhance citizens' understanding of how and why legislators propose very specific boundaries for legislative districts. Shielding the Hofeller Files

from public access—including access mediated by extensive state open records laws—would harm the public interest and the interests of American Oversight specifically.

ARGUMENT

I. Introduction

Democracy relies on the citizenry's ability to learn about the government. As James Madison stated, "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1] "The advancement and diffusion of knowledge, he said, is "the only Guardian of true liberty."[2]

These principles form the heart of open records laws at the federal and state levels. They are often referred to as "sunshine laws" after the famous comment by Justice Louis Brandeis that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[3] The Supreme Court has stressed the connection between these laws and democracy:

> [Open records laws are] often explained as a means for citizens to know "what the Government is up to." This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. . . . The information belongs to citizens to do with as they choose.

NARA v. Favish, 541 U.S. 157, 171-72 (2004) (citation omitted). The Hofeller Files—at least to the extent, which is apparently vast, that they show Thomas Hofeller's work on behalf of or in consultation with state governmental entities—are the quintessential category of documents the

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[1] Letter from James Madison to W.T. Barry (August 4, 1822), in The Writings of James Madison (Gaillard Hunt ed.).

[2] Letter from James Madison to George Thomson (June 30, 1825) (on file with The James Madison Papers at The Library of Congress).

[3] Louis Brandeis, Other People's Money: And How The Bankers Use It, 62 (1933), available at http://babel.hathitrust.org/cgi/pt?id=mdp.39015061017359;view=1up;seq=184.

public should have access to because they reveal how elected representatives sought to, and often did, order the very democracy in which they operated.

While American Oversight is not privy to the full scope of Hofeller's work, the public record indicates he worked for or in consultation with many state governments. A survey of relevant state open records laws indicates that the Hofeller Files would be, or very well should be, public records in a number of states in which Hofeller was active as a redistricting consultant. In short, the Hofeller Files would be disclosable upon request in a number of jurisdictions, including North Carolina. As a result, the Court should not countenance efforts to shroud the Hofeller Files in secrecy based on arguments they are corporate or private records. On the contrary, the Hofeller Files appear to be records that reflect core government functions.

That Hofeller served as a consultant, even informally, for government entities should not exempt his records from the scope of public records laws. Indeed, at the federal level, it is well established that the government can engage non-government actors as consultants and treat the resulting records as government property. Under this approach, courts determine what documents, or portions thereof, can be released to the public based on the Freedom of Information Act, which includes exemptions for privacy, trade secrets, and other categories of information. Accordingly, the Court can conclude that the Hofeller Files may constitute public records without simultaneously declaring that they should become public in their entirety. Open records statutes provide mechanisms to mediate the public release of public records.

A. The Hofeller Files are "public records" under many state statutes.

American Oversight has surveyed several state open records statutes to determine if Hofeller's work for or in consultation with government entities would fall under public records laws. The answer is clear: the Hofeller Files likely are public records under many statutes. And

to the extent some state laws are not dispositive on their face, there are strong arguments that the Hofeller Files, or at least portions thereof, are covered. Therefore, a ruling from this Court excising the Hofeller Files from the public record would contravene the law and policy established by these statutes.

i. North Carolina

The North Carolina Open Records Law provides an obvious entry point for any analysis. The statute defines "public records" to include:

> all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, **made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.**

N.C. Gen. Stat. § 132-1(a) (emphasis added). The phrase "any agency of North Carolina government or its subdivisions" includes "every public office, public officer or official (State or local, elected or appointed) institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government" *Id.* The statute sounds in the underlying principles of open democratic governance: "The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law." *Id.*

As the proceedings before this Court have demonstrated conclusively, the business of redistricting in North Carolina is without question "the transaction of public business by . . . North Carolina." *Id.* Hofeller and the Legislative Defendants were intertwined: "The Court specifically finds, based upon the direct and circumstantial evidence of record, that the partisan

intent demonstrated in Dr. Hofeller's files, as detailed below, is attributable to Legislative Defendants inasmuch that Dr. Hofeller, at all relevant times, worked under the direction of, and in concert with, Legislative Defendants. *Common Cause v. Lewis,* No. 18 cvs 014001, slip op. at ¶ 54 (N.C. Sup. Ct. Sept. 3, 2019). The Court's conclusion regarding attribution drives a similar conclusion on the issue of public records: The Hofeller Files were "made or received" for the government; thus, the materials Geographic Strategies now claims as confidential likely are discoverable public records under North Carolina law.

ii. Florida

Similar conclusions are mandated under the statutory schemes of other states in which Hofeller was active. In Florida, for example, there is a constitutional right of access to legislative records provided in the state constitution. It provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body[.]" Art. I, § 24, Fla. Const. This right specifically encompasses the legislative branch. *Id.* at § 24(a). Further, Florida statutory law provides that "every person has the right to inspect and copy records of the Senate and the House of Representatives received in connection with the official business of the Legislature as provided for by the constitution of this state." Fla. St. § 11.0431. Documents associated with a reapportionment or redistricting plan are open to inspection and copying once a bill implementing the plan or an amendment to such a plan are filed, subject to some exemptions. Fla. St. § 11.0431(2)(e).

An order from this Court that would remove the Hofeller Files from public reach would be particularly damaging in Florida because the state has expressly prohibited many of the outcomes Hofeller sought to achieve. Redistricting in Florida operates pursuant to a 2010 constitutional amendment, the Fair Districts Amendments. Art. III § 20(a), Fla. Const. The

amendment forbids the Florida Legislature from drawing a redistricting plan or an individual district with the "intent to favor or disfavor a political party or incumbent." *Id.*

Florida's experience with redistricting litigation is similar to North Carolina's. When scrutinized, public records revealed efforts to undermine and circumvent the Florida Constitution's prohibition on partisan redistricting. The case *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fla. 2015), warrants attention for that reason. In that case, members of the Florida legislature consulted with Republican redistricting consultants. The resulting maps triggered several years of litigation, which concluded with a finding by the Florida Supreme Court that the Legislature's 2012 congressional redistricting plan violated the Florida Constitution's prohibition on partisan intent and requiring numerous districts redrawn. *Id.* at 371-72. Notably, during the course of the litigation, Republican redistricting consultants worked with members of the Legislature and tried to hide their participation and, after their role became clear, prevent the use and release of documents they created, including maps.

Similar to the case at bar, litigation over the documents followed. The Florida Supreme Court stated that the state's constitutionally-based interest in fair redistricting overcame potentially applicable privileges, such as the legislative privilege, that might ordinarily exclude the documents from disclosure: "[E]ven the significance of a legislative privilege founded on the fundamental principle of separation of powers must yield to the compelling, competing interest in effectuating the constitutional Fair Districts reapportionment standards and 'ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering.'" *League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So.3d 510, 513 (Fla. 2014) (citing *League of Women Voters of Fla. v. Fla. House of Representatives (Apportionment IV)*, 132 So.3d 135, 142 (Fla. 2013)). In a related case, the Court also rejected the notion that the documents were

protected from disclosure as trade secrets. *Bainter v. League of Women Voters*, 150 So.3d 1115, 11132-33 (Fla. 2014).

Although the Florida cases discussed above are not predominantly about public records laws, they nonetheless underscore the strong interest the citizens of Florida have in documents pertaining to redistricting—especially of the character that could be contained in the Hofeller Files—and reveal the immense effort that would be required to claw the Hofeller Files back to the public realm if they are deemed confidential as suggested by Geographic Strategies.

iii. Alabama

Alabama has an even broader open records statute than Florida or North Carolina, allowing citizens to inspect and copy any "public writings" with remarkably few limitations. Ala. Code. § 36-12-40.

While the Open Records Act does not define "public writing, Alabama courts have found the broad language of the statute makes clear "that the legislature intended that the statute be liberally construed." *Chambers v. Birmingham News Co.* 552 So.2d 854, 856 (Ala. 1989). The Alabama Supreme Court has held the phrase to mean a record "reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status of such business and activities can be known by [the] citizens." *Allen v. Barksdale*, 32 So.3d 1264, 1268 (Ala. 2009) (quoting *Stone v. Consolidated Publishing Co.*, 404 So.2d 678, 681 (Ala. 1981)).

Looking elsewhere for guidance, Alabama courts have noted the State Records Commission, § 41-13-1 Ala. Code, includes a broad definition for "public records":

> As used in this article, the term 'public records' shall include all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business and shall also

> include any record authorized to be made by any law of this state belonging or pertaining to any court of record or any other public record authorized by law or any paper, pleading, exhibit or other writing filed with, in or by any such court, office or officer.

The Supreme Court "doubt[ed] the Legislature intended to make a distinction between a 'public writing' and a 'public record." *Allen*, 32 So.3d at 1269; *Stone*, 404 So.2d at 680.

Although the law itself is silent on the point, legislative bodies are presumptively subject to it and at least one court has applied the law to records of legislative officers. *Birmingham News Co. v. Swift*, cv 88-1390 G (Cir. Ct. of Montgomery County, Ala., Aug. 31, 1988). Given the statute's broad language and minimal exemptions, it is very likely the Hofeller records would be disclosed under Alabama's Open Records Act.

iv. Ohio and Texas

In other states in which Hofeller worked, such as Ohio and Texas, it is also likely that materials he created for or shared with the state legislatures would be available under public records laws. Both states have broad open records statutes. Notably, the Texas Public Information Act was promulgated because "[t]he people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy." Tex. Code § 552.001.[4]

Similarly, Ohio's Open Records Law defines "public record" to include "records kept by any public office, including, but not limited to, state, county, city, village, township and school

[4] Texas recently amended its Public Information Act to protect legislative records from disclosure, effective January 1, 2020. *Relating to the disclosure of certain contracting information under the public information law*, 219 Tex SB 943 (2019). The amendment is not retroactive, however, so materials provided by Hofeller likely would still be subject to disclosure.

district units ... ." Ohio Rev. code § 149.43. The law lists numerous classes of documents excluded from the definition of "public record," none of which pertain to legislative records. There is no Ohio Supreme Court case applying the law to the legislature, but that Court has held that public policy requires liberal construction of the provisions defining public records and a strict construction of the exceptions. Any doubt must be resolved in favor of disclosure. *See State ex rel. Post*, 527 N.E.2d 1230 (Ohio 1988). "The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore anyone may inspect such records at any time." *Id.* (citing *Dayton Newspapers, Inc. v. Dayton*, 341 N.W.2d 576, 577 (Ohio 1976)). Therefore, it appears an open records request in Ohio also likely would result in the production of Hofeller's records.

B. Open records laws provide an appropriate mechanism to determine whether the Hofeller Files should be made public.

The interests at stake in the Hofeller Files militate against categorically removing them from the public realm. Instead, open records laws provide an adequate and appropriate vehicle for reviewing whether redistricting records are appropriate for public release.

As discussed, *supra*, the Hofeller Files are likely public records under many state statutes. However, in light of the private interests asserted in them in this litigation, it is important to emphasize that a document's status as a public record does not necessarily lead to the conclusion that the document's contents will be publicly released. Open record laws provide a well-established mechanism to make such determinations on a document-by-document, or even redaction-by-redaction basis. These laws reflect the judgment of the relevant lawmakers – whether Congress for federal FOIA requests or the relevant state legislatures for state level requests – regarding what information contained in public files should be released, and what information in public records should be withheld. Questions raised here regarding whether

portions of the Hofeller Files should be viewed as private, privileged, or protected as trade secrets belong in the first instance to the appropriate state or federal court interpreting the relevant public records law. This Court should not preemptively decide these questions, particularly with respect to records relating to the redistricting work of public entities in states other than North Carolina.

Recognizing that the Hofeller Files potentially implicate the public records regimes of other states does not mean that this court should assume that they all will be publicly released, nor does it mean that the arguments advanced that some or all of these records may be protected as private, privileged, or trade secrets will have no opportunity to be heard. Rather, these types of arguments are often weighed in the application of public records laws. Federal Freedom of Information Act jurisprudence alone contains numerous examples of courts holding that communications between the government and non-governmental entities could be withheld in whole or in part under FOIA exemptions in certain circumstances, implicitly concluding that the records at issue were public records in the first place. For example, in *Formaldehyde Institute v. HHS*, the court held that comments sent to HHS from an epidemiology journal's outside reviewers could be withheld because the reviewers were effectively serving as neutral expert consultants advising on the agency's decision over whether to publish a report submitted by an HHS staff member. 889 F.2d 1120, 1124 (D.C. Cir. 1989). And in *National Institute of Military Justice v. DOD*, the court held that "records containing the opinions and recommendations of non-governmental lawyers" who were advising the Department of Defense about terrorist trial commissions could be exempt under FOIA. 512 F.3d 677, 678 (D.C. Cir. 2008). In contrast, in a recent case a court held that a federal agency's communications with Congress over legislation

could not be withheld under FOIA given the circumstances. *American Oversight v. HHS*, No. 17-1448 (ABJ), slip op. at 7-13 (D.D.C. Mar. 30, 2019).

With respect to any given document, the government and groups like American Oversight may disagree over whether its contents are subject to public disclosure under open records laws. It is critical, however, that the disagreement be justiciable in the first place, allowing the interests of the public, the government, and private entities to be balanced according to clear legal principles established by law and weighed by the appropriate court. Had the documents been preemptively excluded from the public record, public interest groups would have lacked even an opportunity to adjudicate their access to them.

In this case, in light of the strong public interest in the Hofeller Files and the availability of mechanisms under applicable open records laws to balance the public interest and private interests within them, it would be inappropriate to issue a ruling that precludes such reviews in the future.

CONCLUSION

Open records laws are promulgated to protect the rights of citizens to be informed and to understand what their governments are doing on their behalf. The purpose of these laws is paramount here, where the Hofeller Files pertain to the right to vote and the ordering of our representative democracy. There is little, if anything, more critical for citizens to understand than how their elected leaders are drawing maps to impact electoral outcomes. The Hofeller Files should be released so the public citizens can understand what their elected representatives have been doing in their name.

This 13th day of September, 2019.

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